Supreme Court, U.S.

No. 93-1182

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In The Supreme Court Of The United States

OCTOBER TERM, 1993

RODERICK L. CUTRIGHT,

Petitioner,

v.

E. R. CARPENTER COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER AN UNLAWFULLY DISCHARGED CAPTAIN IN THE UNITED STATES ARMY RESERVES WHO SEEKS ONLY MONEY DAMAGES AT LAW FOR HIS EMPLOYER'S VIOLATION OF THE VETERANS' REEMPLOYMENT RIGHTS ACT IS ENTITLED TO A JURY TRIAL.

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NO. _____

IN THE

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-v-

E.R. CARPENTER COMPANY, INC.,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Opinions Below

The decision of the Fourth Circuit is an unpublished per curiam opinion set forth in Appendix A at 1-9. The decision is reported in a table of unpublished decisions: 8 F.3d 817. The opinion is contained in unofficial reporters at 1993 U.S. App. LEXIS 27376; and 126 Lab. Cas. (CCH) ¶ 10,884.

The Order of the District Court that struck the jury is unpublished. Appendix B: 1-2. The District Court struck the jury on the stated ground that the Fourth Circuit's decision in Troy v. City of Hampton, 756 F.2d 1000 (4th Cir.)(en banc), cert. denied, 474 U.S. 864 (1985), required the District Court to grant Respondent Carpenter's motion to strike the jury.

Jurisdiction

The Fourth Circuit issued its decision in this action on October 21, 1993. Appendix A. This Petition is filed within ninety (90) days of October 21, 1993. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions

United States Constitution
Seventh Amendment

In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

Veterans' Reemployment Rights Act, 38 U.S.C. §4302[1]

If any employer, who is a private employer or a State or political subdivision thereof, fails or refuses to comply with the provisions of section [4301](a), (b)(1), or (b)(3), or [4304] of this title, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such

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[1]The only change in this section since Cutright's discharge in November, 1989 was renumbering. Section 4302 of Title 38 was formerly § 2022 of Title 38. See Pub.L. 102-568, § 506(a), (c)(1), October 29, 1992, 106 Stat, 4340, 4341.

provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. Upon application to the United States attorney or comparable official for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, by any person claiming to be entitled to the benefits provided for in such provisions, such United States attorney or official, if reasonably satisfied that the person applying is entitled to such benefits, shall appear and act as

attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof specifically to require such employer to comply with such provisions. No fees or court costs shall be taxed against any person who may apply for such benefits. In any such action only the employer shall be deemed a necessary respondent. No state statute of limitations shall apply to any proceedings under this chapter.

Statement of the Case

Petitioner Roderick L. Cutright ("Cutright") alleges that Respondent E.R. Carpenter Company, Inc. ("Carpenter") discharged him because of his service as a Captain in the United States Army Reserves, in

violation of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended ("Veterans' Reemployment Rights Act" or the "Act"), 38 U.S.C. § 4301 et seq.[2]

Carpenter hired Cutright as a Plant Engineer on March 28, 1988. Throughout his employment with Carpenter, Cutright was an officer in the United States Army Reserve, 80th Training Division. As an officer in the United States Army Reserves, Cutright received orders for training duty that required days of absence from his duties at Carpenter.

During 1989, Cutright's reserve training duty was "fragmented". "Fragmented" training

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[2]The District Court had jurisdiction of this action pursuant to 38 U.S.C. § 4302 and 28 U.S.C. § 1331; the Fourth Circuit had jurisdiction of Cutright's appeal pursuant to 28 U.S.C. § 1291. Pursuant to 28 U.S.C. § 1254(1), Cutright now petitions this Court for a writ of certiorari to review the decision of the Fourth Circuit.

required Cutright to miss days during normal work weeks on an intermittent basis, one or two days at a time. "Fragmented" training duty is different from the more common obligation of a reservist for a single two week period, apart from any weekend duty.

In this action, Cutright alleges that Carpenter refused to allow its Plant Engineer to miss days of work during work weeks because of this reserve duty. Consequently, Carpenter fired Cutright on November 2, 1989, a day between two periods of Cutright's training duty in late October and early November.

Filing an action pursuant to the Act, 38 U.S.C. § 4302, Cutright sought only money damages in compensation for his unlawful discharge.[3] In the first paragraph of his

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[3]Cutright later amended his Complaint, adding a claim of unlawful pay deductions. The

Complaint, Cutright expressly described his action as an "action for monetary damages at law".[4] In the prayer for relief, Cutright asked the District Court only for "monetary damages"; i.e., "the wages and benefits that Cutright has lost because of his unlawful discharge on November 2, 1989." Cutright requested neither reinstatement nor any other relief that constitutes a traditional or common law form of equitable relief.

Despite the nature of Cutright's action, the District Court, citing Troy v. City of

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Fourth Circuit affirmed the District Court's denial of Cutright's allegation of unlawful pay deductions.

[4]In effect, Cutright was attempting to exercise the right existing at common law in the 18th century to proceed at law for money damages for the type of wrong alleged in his Complaint. See Opinion of Fourth Circuit, Appendix A, at 7 n. 2: "These actions could have been brought in courts of law or equity, depending upon the relief sought."

Hampton, 756 F.2d 1000 (4th Cir.)(en banc), cert. denied, 474 U.S. 864 (1985), as controlling precedent, characterized Cutright's Complaint as seeking only "equitable" relief. Having found that all relief sought was "equitable", the District Court held inapplicable the constitutional right of jury trial set forth in the Seventh Amendment of the Constitution of the United States and struck Cutright's jury demand.

Proceeding to a bench trial, the District Court entered judgment for Carpenter. The District Court found as a matter of fact that Cutright failed to carry his burden of proof that: "but for the Reserve status which he enjoyed at the time, he would not have been fired."

Cutright appealed the District Court's striking of the jury to the United States

Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the District Court's striking of Cutright's jury demand, holding that Troy v. City of Hampton, 756 F.2d 1000 (4th Cir.)(en banc), cert. denied, 474 U.S. 864 (1985), established that any relief under the Veterans' Reemployment Rights Act was equitable relief for which no right of jury trial arose under the Seventh Amendment.

Cutright now petitions this Court for a writ of certiorari to review the holding of the Fourth Circuit that denied Cutright his constitutional right of jury trial on his claim for money damages at law.

Reasons for Allowance of Writ

Conflict Between Third and Fourth Circuits

This Court should review this case pursuant to Rule 10.1(a) of the Rules of this

Court, because the decision of the Fourth Circuit in this case, holding that all relief available under the Veterans' Reemployment Rights Act is "equitable" relief, conflicts with the decision of the Third Circuit in Gruca v. United States Steel Corp., 495 F.2d 1252 (3rd Cir. 1974). In Gruca v. United States Steel Corp., the Third Circuit stated in pertinent part:

> A veteran's arsenal of remedies under § 459 [the predecessor of 38 U.S.C. § 4301-02] is not limited solely to those which are equitable in nature. By its very terms § 459 provides the district court with power "to require . . . [the] employer to comply with . . . [certain provisions of the section] and to compensate such person for any loss of wages or benefits . . ." Thus, a veteran can seek legal or equitable relief, or both.

495 F.2d at 1257.

Conflict with Precedent of This Court

This Court also should review this case

pursuant to Rule 10.1(c) of the Rules of this Court, because the denial of Cutright's constitutional right of jury trial in a case seeking only money damages, the classic form of "legal" relief at common law, involves an important question of federal law and conflicts with applicable decisions of this Court. See Wooddell v. Electrical Workers 502 U.S. ___, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991); Teamsters Local 391 v. Terry, 494 U.S. 558, 110 S.Ct. 1339, 108 L.Ed.2d 519 (1990); Lytle v. Household Mfg., Inc., 494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed. 504, (1990).

Cutright seeks only money damages in this action; he has never sought reinstatement or any other form of injunctive or declaratory relief. Consequently, this action is for "legal" relief and Cutright is entitled to a jury trial under the Seventh Amendment of the

Constitution.

The Seventh Amendment of the Constitution of the United States provides that:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

This Court analyzed the constitutional right to jury trial in a case asserting a statutory cause of action in Teamsters Local 391 v. Terry, 494 U.S. 558, 110 S. Ct. 1339, 108 L.Ed.2d 519 (1990), and Wooddell v. Electrical Workers, 502 U.S. ___, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991). In both Terry and Wooddell, this Court held that a plaintiff's right of jury trial under the Seventh Amendment depends on the nature of the action and the form of relief sought. See, e.g.,

Teamsters Local 391 v. Terry, 494 U.S. 558, 565, 110 S. Ct. 1339, 1345, 108 L.Ed.2d 519, 528 (1990).

This Court further stated that the second factor, the form of relief sought, is the more important factor.[5] In other words, when the relief sought is of a form traditionally described as "legal", then the right of jury trial attaches. Money damages suffered and recoverable because of a wrongful act are

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[5]In Teamsters Local 391 v. Terry, four members of this Court joined in this opinion of Justice Marshall. Justice Brennan, concurring, opined that the nature of the relief sought was the only relevant factor. 494 U.S. at 574-81, 110 S.Ct. at 1349-53, 108 L.Ed.2d at 533-35. Justice Brennan further noted that the test stated by Justice Marshall would produce the same result as a test that looks only to the nature of the relief sought. 494 U.S. at 74-75, 110 S.Ct. at 1350, 108 L.Ed.2d at 534. Justice Stevens also concurred in the decision of the Court, but offered a different rationale. 494 U.S. at 581-84, 110 S.Ct. at 1353-55, 108 L.Ed.2d at 538-40.

traditionally described as "legal". Wooddell v. Electrical Workers, 502 U.S. ___, 112 S.Ct. 494, 498, 116 L.Ed.2d 419, 427 (1991). In this case, Cutright seeks only money damages for Carpenter's violation of the Act.

The fact that Cutright seeks money damages - legal relief - under a statute, rather than in a common law action, does not vitiate his constitutional right to trial by jury.

It is well established that the constitutional right to jury trial includes more than the common law forms of action recognized in 1791. The phrase "suits at common law" contained in the Seventh Amendment refers to "suits in which legal rights [are] to be ascertained and determined, in contradistinction to those where equitable rights alone [are] recognized, and equitable

remedies [are] administered." Teamsters Local 391 v. Terry, 494 U.S. 558, 564, 110 S. Ct. 1339, 108 L.Ed.2d 519, 527 (1990), citing Parsons v. Bedford, 28 U.S. 433, 447, 3 Pet. 433, 447 (1830).

This Court in Teamsters Local 391 v. Terry further analyzed the nature of the Seventh Amendment right of jury trial by comparing the particular statutory action to the 18th century actions brought in the courts of England before the merger of the courts of law and equity. When compared to 18th century legal actions, this action is most analogous to the common law action of indebitatus assumpsit. This is the common law action available to a discharged servant for compensation equivalent to back pay or lost wages. See Troy v. City of Hampton, 756 F.2d 1000, 1008 (4th Cir. 1985)(Ervin, J.,

dissenting). The existence of this common law analogy to an action for back pay or lost wages under the Act assists in establishing that Cutright has a jury trial right in this action. Id.

In determining the nature of the remedy sought, courts also have examined the particular language of the statutory statement of remedy. In this case, the pertinent statutory language is as follows:

> If any employer, who is a private employer . . . , fails or refuses to comply with the provisions of section [4301](a), (b)(1), or (b)(3), or section [4304] of this title, the district court of the United States. . ., shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions **and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action.** Any such

> compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. [Emphasis added.]

38 U.S.C. § 4302. The use of the word "compensate" indicates the availability of legal relief in the form of compensatory damages. This statutory language indicates that Cutright is entitled to an award of monetary damages as compensation for any monetary damages that Cutright has suffered because of Carpenter's wrongful act. See Kolkhorst v. Tilghman, 897 F.2d 1282, 133 LRRM 2807, 2812 (4th Cir. 1990).

In Teamsters Local 391 v. Terry, 494 U.S. 558, 564-74, 110 S.Ct. 1339, 1344-49, 108 L.Ed.2d 519, 527-33 (1990), this Court established the importance of the distinction between a plaintiff seeking equitable relief, such as reinstatement, and legal relief, such

as lost wages. See also Smith v. Barton, 914 F.2d 1330, 1337 (9th Cir. 1990)(Rehabilitation Act); see generally Lytle v. Household Manufacturing, Inc., 494 U.S. 545, 110 S.Ct. 1331, 108 L.Ed. 2d 504, 52 FEP Cases (BNA) 423, 424 n. 1 (1990). The decision of the Fourth Circuit in this case denies this distinction and improperly denies Cutright his right of jury trial under the Seventh Amendment of the United States Constitution.

Conclusion

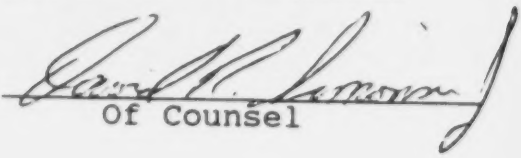
For the reasons stated in this Petition, Cutright asks that this Court grant his Petition, issue a writ of certiorari, and review the judgment of the United States Court of Appeals for the Fourth Circuit.

Cutright also asks for such other and further relief as is proper.

Dated this 18th day of January, 1994.

Respectfully submitted,

RODERICK L. CUTRIGHT

By: 
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Appendix A: 1

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RODERICK L. CUTRIGHT,

Plaintiff-Appellant,

v. No. 92-1399

E. R. CARPENTER COMPANY, INCORPORATED,

Defendant-Appellee.

On Appeal from

The United States District Court

For the Eastern District of Virginia,

Richmond Division,

Judge James R. Spencer, District Judge

Submitted: March 19, 1993

Decided: October 21, 1993

Before WILKINSON, WILKINS, and NIEMEYER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

COUNSEL: David R. Simonsen, Jr., Richmond, Virginia, for Appellant; Eva S. Tashjian-Brown, Rodney A. Satterwhite, MCGUIRE, WOODS, BATTLE & BOOTHE, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in the Circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Roderick Cutright appeals from the district court's judgment in favor of Defendant E. R. Carpenter Company,

Inc. ("Carpenter") on claims for discriminatory discharge and salary deductions in violation of the Vietnam Veterans' Readjustment Assistance Act (the "Act"), 38 U.S.C.A. §§ 2021-2027 (West 1991 & Supp. 1992). Cutright contends that the district court erroneously denied his request for a jury trial and his claim for recovery of salary deductions by Carpenter for days Cutright spent out of work on military leave. Finding no error, we affirm the district court's judgment.

Cutright, a Captain in the United States Army Reserve, 80th Training Division, was hired as a Plant Engineer for Carpenter in March 1988. Cutright was a salaried employee, exempted for purposes of wage and hour laws, who routinely worked in excess of forty hours per week. Cutright's active duty with the 80th

Training Division required him to be away from work for two weeks in 1988, and four weekdays in 1989, May 10-12 and October 27. Cutright's employment was terminated on November 2, 1989.

Cutright sued Carpenter under the Act for lost wages and benefits, alleging that he was discharged because of his obligation as a member of the Army Reserve. After denying Cutright's request for a jury trial, the district court conducted a bench trial and found that Carpenter discharged Cutright for legitimate business reasons unrelated to his military reserve status. After the trial, Cutright moved to amend his complaint to include a claim for Carpenter's $511.32 deduction from his 1989 annual salary for the four days he was away on military leave in May and October of 1989. The court granted the motion to amend, but denied the claim for

recovery of unpaid wages.

"Claims under 38 U.S.C. § 2021 et seq. are equitable in nature and must be tried to the court." Troy v. Hampton, 756 F.2d 1000, 1003 (4th Cir.) (in banc), cert. denied, 474 U.S. 864 (1985). The Troy Court based its conclusion on the clear congressional intent that proceedings under the Act be governed by equitable principles,[1] the similitude of the Act's remedies to the equitable, restitutionary remedies provided under Title VII, 42 U.S.C. § 2000e-5(g) (1988), and the fact that the back pay remedy available under the Act "is discretionary with the district

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[1]"There is also added a provision at the end of this section which reaffirms and reflects more clearly the congressional intent that the legal proceedings under this chapter shall be governed by equitable principles of law . . . ." Troy, 756 F.2d at 1002 (quoting S. Rep. No. 93-907, 93rd Cong., 2d Sess. at 111-12) (emphasis omitted).

court and 'is an integral part of the equitable remedy of reinstatement.'" Id. at 1002 (quoting Smith v. Hampton Training School for Nurses, 360 F.2d 577, 581 n.8 (4th Cir. 1966)). The equitable nature of the remedy sought by Cutright's claim also precludes a jury trial under the more important second prong of the two-prong Seventh Amendment right to jury trial analysis.[2] Teamsters Local No.

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[2]The first prong, the nature of the issues involved, as determined by a comparison to actions recognized in 18th Century England before the merger of the courts of law and equity, is at best inconclusive as applied to this case. Cutright's claim for backpay based upon discriminatory acts by an employer may be closely analogized to an 18th Century tort action or an action to enforce an express or implied employment contract. These actions could have been brought in courts of law or equity, depending upon the relief sought. See, e.g., Hill v. Winn-Dixie Stores, Inc., 934 F.2d 1518, 1524 (11th Cir. 1991) (action for discrimination and constructive discharge resulting from plaintiff's jury duty); Smith v. Barton, 914 F.2d 1330, 1337 (9th Cir. 1990) (action for discriminatory discharge

391 v. Terry, 494 U.S. 558, 565 (1990). We find that the district court properly denied Cutright's request for a jury trial.

Cutright's claim for pay deductions for days missed due to military leave is also without merit, for an employer is not required to pay a reservist-employee for time missed from work. Monroe v. Standard Oil Co., 452 U.S. 549 (1981). The Act "does not entitle a reservist to benefits that are conditioned upon work requirements demanding actual performance on the job," id. at 553 n.7, because "Congress did not intend employers to provide special benefits to employee reservists not generally made available to other employees." Id. at 561.

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resulting from plaintiffs' physical handicaps), cert. denied, 59 U.S.L.W. 3837 (U.S. 1991).

The evidence presented at the bench trial showed that Cutright received $874 from the Army Reserves for on-duty time between May 10 and 12, 1989. That amount exceeds Cutright's total four-day claim by $383.49, and precludes a finding that Cutright actually suffered some loss of wages or benefits. See 38 U.S.C.A. § 2022 (district court can, in its discretion, "compensate [a reservist- employee] for any loss of wages or benefits suffered by reason of such employer's unlawful action."). We find that the Act was not intended to allow Cutright and similarly situated reservist-employees a special benefit unavailable to other employees, namely the opportunity to earn two salaries from two employers for one day of work. Hence, the district court's denial of Cutright's claim for recovery of pay deductions was

appropriate.

For the foregoing reasons, we affirm the judgment on the rationale set forth by the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

Appendix B: 1

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

RICHMOND DIVISION

RODERICK L. CUTRIGHT Plaintiff, v. E.R. CARPENTER COMPANY, INC. Defendant.	)	CA No. 3:91CV00275

ORDER

This matter came before the court on November 7, 1991 on defendant's motion to strike plaintiff's jury demand. For the reasons stated from the bench, defendant's motion is GRANTED.

Additionally, the trial has been changed from 10:00 on November 20, 1991 to 9:30 on November 20, 1991.

And it is SO ORDERED.

s/ James R. Spencer
UNITED STATES DISTRICT JUDGE

Date: 7 NOV 1991

No. 93-1182

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E. R. CARPENTER COMPANY, INC.,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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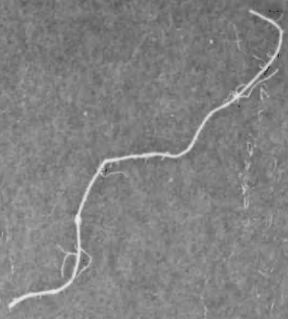

QUESTIONS PRESENTED

A. WHETHER A CLAIM FOR BACK PAY FROM A FORMER EMPLOYER ENTITLES A PLAINTIFF UNDER THE VIETNAM ERA VETERANS' READJUSTMENT ASSISTANCE ACT OF 1974 TO A JURY TRIAL.

B. WHETHER THE LACK OF A JURY WAS HARMLESS ERROR.

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RULE 29.1 STATEMENT

Respondent E. R. Carpenter Company, Inc. is a corporation with no publicly-held parents, subsidiaries or corporate affiliates that have any financial interest in the outcome of this case.

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STATEMENT OF THE CASE

A. Summary of Procedural History

Petitioner Roderick L. Cutright ("Cutright") sued in the United States District Court for the Eastern District of Virginia, alleging that his employer, E. R. Carpenter Company, Inc. ("Carpenter"), terminated his employment in violation of the Vietnam Era Veterans' Readjustment Assistance Act of 1974 ("Veterans' Act"), 38 U.S.C. § 4301 et seq. He sought back pay and benefits from Carpenter, based on his discharge. Petition, p. 9.

The trial court granted Carpenter's Motion to Strike Plaintiff's Demand for a Jury Trial. At trial, the Court found that Carpenter had discharged Cutright for legitimate business reasons unrelated to his military reserve status. Appendix A: 4.

Cutright appealed to the United States Court of Appeals for the Fourth Circuit on two grounds, one of which was his claim that the District Court improperly struck the

jury demand. The Fourth Circuit affirmed by unpublished *per curiam* opinion. Cutright now seeks certiorari on the issue of whether he was entitled to a jury trial on his claims under the Veterans' Act.

B. Statement of the Relevant Facts

Carpenter hired Cutright in 1988 to perform plant engineering tasks at its manufacturing facility. When he was hired and throughout his employment, Cutright was also an officer in the United States Army Reserve.

Although Cutright claims in his brief, without citation to the record, that "Carpenter refused to allow its Plant Engineer to miss days of work during work weeks because of this Reserve duty. . . ." (Petition p. 8), that was not an issue at trial. Instead, the issue was whether he was discharged because of his reserve status. Appendix A: 4. There was ample evidence at trial that his managers were dissatisfied with his job performance. The trial court found

that "Carpenter discharged Cutright for legitimate business reasons unrelated to his military reserve status." Appendix A: 4. Petitioner has not appealed this aspect of the Court's ruling.

SUMMARY OF THE ARGUMENT

Supreme Court Rule 10.1 provides for a writ of certiorari "only when there are special and important reasons therefor." No such reasons exist in this case. Although petitioner suggests that there might be a split in the circuits or that this Court needs to resolve the issue of whether back pay from an employer constitutes a legal rather than a restitutionary remedy, neither is true.

First, this Court has already addressed the issue in Teamsters Local 391 v. Terry, 494 U.S. 558, 572 (1990), and, citing its earlier decision in Curtis v. Loether, 415 U.S. 189 (1974), reiterated "that back pay sought from an employer under Title VII would generally be restitutionary in nature . . . ." Here, petitioner seeks back pay from his employer and, under this Court's Terry analysis, that would constitute equitable relief not warranting a jury trial.

As for the alleged conflict between the Third and Fourth Circuits, there is none. The only case petitioner cites

is a 20 year old Third Circuit case, Gruca v. U.S. Steel Corp., 495 F.2d 1252 (3d Cir. 1974), which did not even mention the right to a jury trial and has been superseded by amendments to the Veterans' Act clarifying its equitable nature. Gruca, therefore, does not present a current conflict either with the Fourth Circuit or this Court's ruling almost 15 years later in Terry.

Finally, the lack of a jury was harmless error. The evidence at trial would have warranted a JNOV for Carpenter even if there had been a jury, so the court's ruling did not affect the outcome of this case.

There are, therefore, no special and important reasons for this Court to review the Fourth Circuit's decision.

ARGUMENT

A. IT IS WELL SETTLED THAT PETITIONER IS NOT ENTITLED TO A JURY TRIAL UNDER THE VETERANS' ACT BECAUSE HIS ACTION AND REMEDIES ARE EQUITABLE IN NATURE.

The parties agree that the test articulated in Teamsters Local 391 v. Terry governs this issue. Oddly, petitioner cites Terry for his claim that, because the relief he sought (back pay) was monetary, it was automatically legal rather than equitable. Petition, p. 13. That is not at all what this Court held in Terry. Terry granted a jury demand under the National Labor Relations Act (a wholly different action from the Veterans' Act at issue here), but specifically refused to hold that "any award of monetary relief must necessarily be 'legal' relief." 494 U.S. at 570. Instead, this Court noted that: "[t]o determine whether a particular action will resolve legal rights, we examine both the nature of the issues involved and the remedy sought." Id. at 564-65.

See also, Curtis v. Loether, supra (Court applied the same test in a case brought under the Civil Rights Act of 1968).

This Court "characterized damages as equitable where they are restitutionary, such as in 'action[s] for disgorgement of improper profits.'" 494 U.S. at 565, 570. The Terry plaintiffs, on the other hand, sought damages from their union representing pay they would have received from their employer if not for the union's alleged breach of duty. Id. at 562-63. The Court specifically distinguished the money sought from the union in Terry from the type of back pay sought here directly from the employer:

> The back pay sought by respondents is not money wrongfully held by the Union, but wages and benefits they would have received from [the employer] had the Union processed the employees' grievances properly. Such relief is not restitutionary.

Id. In contrast, petitioner here seeks money he claims was wrongfully withheld by the employer in the form of back pay. Petition, p. 9. This is purely restitutionary:

> Furthermore, the Court has noted that back pay sought from an employer under Title VII would generally be restitutionary in nature, see Curtis v. Loether, in contrast to the damages sought here from the Union. Thus, the remedy sought in this duty of fair representation case is clearly different from back pay sought for violations of Title VII.

494 U.S. at 572 (citation omitted).[1]

In Troy v. City of Hampton, 756 F.2d 1000, 1003 (4th Cir.), cert. denied, 474 U.S. 864 (1985), the Fourth Circuit correctly applied this Court's Terry analysis to conclude that back pay sought under the Veterans' Act is equitable: "claims under 38 U.S.C. § 2021 et seq. are equitable in nature and must be tried to the court."[2]

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[1]Cutright's reliance on Wooddell v. IBEW Local 71, 112 S.Ct. 494, 116 L.Ed.2d 419 (1991), is similarly misplaced. There plaintiff sought damages from his union because of alleged discriminatory referral practices. This Court held a jury trial appropriate, because the damages he sought were not restitutionary.

[2]Petitioner's use of a dissenting opinion in Troy to attempt to compare a claim under the Veterans' Act to an 18th Century common law claim of *indebitatus assumpsit*

(continued...)

Citing Terry, Troy, and the congressional intent that the Act "be governed by equitable principles," the Fourth Circuit correctly held in this case that "the equitable nature of the remedy sought by Cutright's claim also precludes a jury trial . . . ." Appendix A: 6. This involved no new

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[2](...continued)
ignores rulings by other circuit courts on 18th Century analogies to Civil Rights actions. See, e.g., Smith v. Barton, 914 F.2d 1330, 1337 (9th Cir. 1990), cert. denied, 111 S. Ct. 2825, 115 L.Ed.2d 995 (1991) (citation omitted) ("plaintiff's [Title VII] action is most closely analogous either to an eighteenth century tort action or an implied action brought to enforce an express or implied employment contract. Such actions could have been brought in either courts of law or courts of equity, depending on the relief sought. Therefore, this first factor is not persuasive authority either for or against a jury trial . . ."). The relative insignificance of historical analogy has led Justice Brennan to call for its deletion altogether:

> [T]his Court, in expounding the test, has repeatedly discounted the significance of the analogous form of action for deciding where the Seventh Amendment applies. I think it is time we dispense with it altogether.

Terry, 110 S. Ct. at 1350 (Brennan, J., concurring). The search for an 18th Century analogy is certainly unnecessary here in light of this Court's characterization of back pay as equitable in Terry.

rule of law. This Court should deny certiorari here for the very same reasons it did in Troy. The rules are the same. The test is the same. No "special and important reasons" justify a writ of certiorari.

B. THERE IS NO CONFLICT IN THE CIRCUITS.

Finally, petitioner, citing Gruca v. U. S. Steel Corp., 495 F.2d 1252 (3d Cir. 1974), asserts that a conflict with the Third Circuit warrants a writ of certiorari. Gruca, however, did not even mention the right to a jury trial. Instead, the Gruca court held that claims under the Act could be both legal and equitable, and applied a state statute of limitations to part of a plaintiff's claim. Eight months later, however, Congress passed the 1974 Amendments to the Veterans' Act, which clarified the Act's equitable nature:

> Included in the 1974 amendments is a provision that no state statute of limitations shall apply to any proceedings under the Act . . . . Congressional intent that proceedings be governed by equity principles clearly indicates that Congress found the rights and remedies

> established by the Act to be equitable in nature.

Troy, 756 F.2d at 1002 (citing 38 U.S.C. § 4302).[3] Gruca, therefore, has been overruled by changes to the statute, and does not conflict with the Fourth Circuit:

> The legislative history accompanying the amendments makes it clear that Congress specifically intended to overrule cases like . . . Gruca v. U.S. Steel Corp., supra, as inconsistent with the original intent of Congress.

Stevens v. Tennessee Valley Auth., 712 F.2d 1047, 1055 (6th Cir. 1983) (Citing S.Rep. No. 907, 93d Cong., 2nd Sess. 111 (1974), reprinted in 120 Cong.Rec. 2022 (1974)).

In short, the Gruca case was decided before the amendment, was overruled by the amendment, and does not present a conflict with the more recent rulings in either

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[3]Public law 93-508, § 404(a), added the statute of limitations language on December 3, 1974. Gruca was decided eight months earlier in April, 1974.

Terry or Troy. The law is clear and in conformity throughout the circuits.

C. THE ABSENCE OF A JURY WAS HARMLESS ERROR.

In determining whether the denial of a jury is a harmless error, courts should "consider the evidence in the same manner as if [the] appeal had been from a judgment on a directed verdict in a jury case." Freeman Contractors v. Central Sur. & Ins. Corp., 205 F.2d 607, 613 (8th Cir. 1953). "[I]f on the factual issues raised by the pleadings a jury verdict in favor of appellant would have to be set aside because of lack of substantial foundational evidence, any error in refusing a jury trial would constitute harmless error not justifying retrial." King v. United Ben. Fire Ins. Co., 377 F.2d 728, 731 (10th Cir.), cert. denied, 389 U.S. 857 (1967).[4] While petitioner may have disagreed with his

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[4]See also Troy, 756 F.2d at 1003 where the court noted (continued...)

supervisor's assessment of his performance, he has not disputed the findings of the trial court that they were dissatisfied with his job performance, and that was the reason for his discharge. Petitioner would thus lack the foundational evidence necessary to meet the burden of proof set out by the trial judge, and a JNOV for Carpenter would have been appropriate.

The district court's refusal to grant the petitioner a jury is, therefore, harmless error, and does not provide any of the special or important reasons that might warrant review by this Court.

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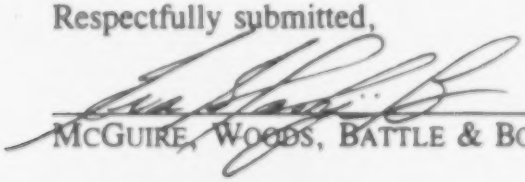
[4](...continued)
that: "[i]f only one reasonable verdict was possible from the evidence, harmless error would have strong appeal . . . ." The Troy court also found that "in close cases the losing parties' right to appellate review can be prejudiced where there is a general jury verdict and the appellant was entitled to the benefit of the separate findings and conclusions provided by Rule 52." Id. However, this was not a close case and the plaintiff did receive the benefit of separate findings of fact and conclusions of law provided by Federal Rule 52.

CONCLUSION

For the above reasons, Carpenter requests that the Court deny the Petition for a Writ of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify under penalty of perjury that, on February 18, 1994, pursuant to Counsel for Respondent's instructions, I mailed FORTY (40) copies of the above Respondent's Brief in Opposition to the Clerk's office of the Supreme Court of the United States, and THREE (3) copies to Counsel of Record for Petitioner:

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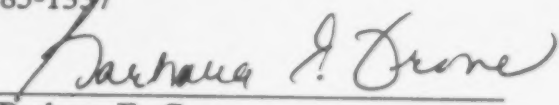

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